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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1966

NO. 724

FRANK A. DUSCH, Et Al.,
Appellants,

v.

J. E. CLAYTON DAVIS, ROLLAND D. WINTER, CORNELIUS D. SCULLY And HOWARD W. MARTIN,
Appellees.

On Appeal From The United States Court Of Appeals for the Fourth Circuit

BRIEF FOR APPELLEES

INTRODUCTION

Throughout this brief the appellants[1] will be referred

[1] Appellants, Frank A. Dusch, John McCombs, Edward T. Caton, III, W. H. Kitchin, Jr., L. S. Hodges, S. Paul Brown, Swindell Pollock, Kenneth N. Whitehurst, Lawrence E. Marshall, James Darden and Earl Tebault were members of the City Council of the City of Virginia Beach; John B. James, Harry Bailey, Joseph T. Crosswhite, Sr., were members of the Electoral Board of the City of Virginia Beach; V.

to as "OFFICIALS", and the appellees[2] will be referred to as "VOTERS".

QUESTIONS PRESENTED

"VOTERS" adopt the phrasing of the three questions proposed in "OFFICIALS'" brief, but submit an additional and decisive question is presented, namely:

> Can "OFFICIALS" raise for the first time in this Court the applicability of the doctrine of One Man—One Vote to the City of Virginia Beach, where "OFFICIALS" failed to challenge the original District Court ruling that the principle was applicable, sought Legislative reapportionment based upon the applicability of the doctrine, failed to raise the issue in a second District Court hearing, and failed to argue the issue in the Court of Appeals?

STATEMENT OF THE CASE

"VOTERS" supplement "OFFICIALS'" statement of the case in the following particulars:

Alfred Etheridge was Treasurer of the City of Virginia Beach; Ivan D. Mapp was Commissioner of Revenue of the City of Virginia Beach; and William P. Kellam and P. B. White were members of the House of Delegates of the Virginia General Assembly, representing the City of Virginia Beach.

[2] Appellees, J. E. Clayton Davis, Rolland D. Winter, Cornelius D. Scully and Howard W. Martin, are citizens of the Commonwealth of Virginia, of the Boroughs of Lynnhaven, Bayside, Lynnhaven and Kempsville, respectively, in the City of Virginia Beach, and are duly qualified voters, electors and taxpayers, and sued in behalf of themselves and all other citizens of the City of Virginia Beach, Virginia, similarly situated.

In 1961, Princess Anne County, Virginia, had a county form of government consisting of Six (6) magisterial districts, each being allocated One (1) supervisor, regardless of population. The Six (6) supervisors constituted the Board of Supervisors, the governing body of the county. The resort City of Virginia Beach had a councilmanic form of government, consisting of Five (5) councilmen elected at large.

Princess Anne County was immediately adjacent to the City of Norfolk, Virginia, and under the law of Virginia a city then had the right to petition a special three-judge annexation court to annex portions of a county, but not of a city.

Princess Anne County, being fearful of annexation of a portion of its lands by the City of Norfolk formed a committee to attempt to effect a merger of the resort City of Virginia Beach and the County of Princess Anne, for the admitted purpose of isolating Princess Anne County from annexation by the City of Norfolk. (R. 36) In order to obtain the consent of the resort City of Virginia Beach, the merger agreement provided that the new City would be divided into Seven (7) boroughs (R. 44), the geographical limits of one borough to be the limits of the old City of Virginia Beach, and the geographical limits of the other six boroughs would comprise those of the six magisterial districts of Princess Anne County. The name of Seaboard Magisterial District was changed to Princess Anne. (R. 44).

The borough of Virginia Beach was given five seats on the new Council and the other boroughs were given one seat each. The citizens of the respective boroughs could only vote for the Councilman assigned to his respective borough. The boroughs were tantamount to wards.

The Seven (7) boroughs and their representation on Council and population areas follows: (R. 7, 24, 25)

Representation On Council	District	Population Per District—1960	Projected Population Per District, January 1, 1964
1	Blackwater	733	862
1	Pungo	2,504	2,806
1	Princess Anne	7,211	7,957
1	Kempsville	13,900	22,254
1	Lynnhaven	23,731	37,760
1	Bayside	29,048	36,027
5	Virginia Beach	8,091	10,473

The merger agreement provided that the above apportionment of representation could be preserved through September 1, 1971, at which time the Council was required to submit a new plan for election of Councilmen to the voters. (R. 44)

As of 1960, the three (3) urban boroughs of Lynnhaven, Bayside, and Kempsville contained 66,679 people of the total population of 85,258. Seventy-eight (78%) per cent of the population had only three (3) representatives on Council or twenty-seven (27%) per cent of the representation on Council.

The total taxes realized from real estate as of April 1964 was $4,145,821.54. Of this sum, $970,850.04 was realized from Bayside Borough, $707,124.54 from Kempsville Borough and $1,471,431.02 from Lynnhaven Borough, or a total from these three districts of $3,149,405.60, which sum represents seventy-five (75%) per cent of the total taxes realized from real estate for the entire city. (Petitioners' Exhibit #2, R. 27; R. 31, R. 32)

"VOTERS" first invoked the original jurisdiction of the Supreme Court of Appeals of Virginia as provided in Section 121 of the Constitution of Virginia (See Appendix A, I) and Sections 15.1-803 and 15.1-806 of the Code of Virginia of 1950, as amended. (See Appendix A, II)

On November 30, 1964, the Supreme Court of Appeals of Virginia held, without passing on the federal question raised by the writ of mandamus, i.e., the Fourteenth Amendment protection of the value of "VOTERS'" vote, that Section 117 of the Constitution of Virginia (See Appendix A, III) authorized the legislature to grant special charters, abrogating the protection afforded by Section 121.

Having exhausted their state court remedies "VOTERS" filed the instant suit in the United States District Court at Norfolk requesting the convening of a three-judge Federal Court.[3] The three-judge Court ruled that jurisdiction of a statutory court had not been established because the issue was local in character and involved an established constitutional question. (R. 76) In remanding the case to the District Court, the statutory court held that the applicability of the doctrine of "one man — one vote" was apparent and the ruling of the Court of Appeals for the Fourth Circuit in *Ellis* v. *Mayor and City Council of Baltimore* (4 Cir. 1965) 352 F. 2d 123 was controlling.

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[3] At or about the same time citizens of the City of Chesapeake, Virginia, filed a similar suit and the Virginia Beach and Chesapeake cases were heard concurrently by the Three-Judge Court and the District Court. When the District Court handed down its opinion of December 7, 1965, the City of Chesapeake secured an amendment to its charter providing for the election of councilmen at large, whereas Virginia Beach sought the "Seven-Four Plan" discussed, infra.

The District Judge in his opinion of December 7, 1965 (R. 78) ruled that the apportionment of councilmen as constituted under the merger agreement was unconstitutional and violative of the principle established in *Reynolds* v. *Sims*, (1964) 377 U.S. 533.

Following the Lower Court opinion of December 7, 1965, "OFFICIALS" passed a councilmanic resolution agreeing that a new Council should be constituted as soon as practicable providing for substantial equality of representation.[4] On this representation the District Court stayed proceedings to allow officials to introduce a new charter to the Virginia General Assembly of 1966. (R. 82)

Officials obtained an amendment to the Charter denominated the "Seven-Four Plan" (R. 87, 88), which main-

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[4] (R. 18)

"Whereas, the drastic changes in concepts of representation brought about by decisions of the United States Supreme Court since the adoption of the city's present plan of representative (representation) (sic) have called into question the wisdom of continuing this plan; and

Whereas, members of the Council have recognized the inequalities of the present plan and are of opinion that the public interest requires that the plan be changed sooner than January 1, 1968.

Now, Therefore, Be It Resolved by the Council of the City of Virginia Beach, Virginia:

1. The present plan of representation of the Council of the City of Virginia Beach should be replaced as soon as practicable by a new plan providing substantial equality of representation.

2. The Council hereby commits itself to initiate a new plan for representation of the Council and to request its representatives in the General Assembly to introduce a bill at the earliest opportunity to amend the charter of the City of Virginia Beach to effectuate such plan and to urge its representatives to press for the prompt passage of such bill.

3. The plan will provide for the election of councilmen by one of the following methods so that under any plan the vote of one citizen will be substantially equal to the vote of every other citizen in the city:

..."

tained the same geographical limits of the boroughs and the same disparate populations condemned by the District Court opinion of December 7, 1965. The plan, admittedly, sought to insure that there would be members elected to Council from the four under-populated boroughs. (R. 93)[5] To effect this end, the plan apportioned One (1) residential councilman to each of the Seven (7) boroughs of the city, regardless of population. The only change was to provide that Four (4) of the Eleven (11) councilmen would run at large, and all voters were given the right to vote for the residential councilmen.

The seven residential councilmen would be elected without reference to the total votes received by all councilmen.[6]

"VOTERS" promptly filed a supplemental complaint indicting the "Seven-Four Plan" for perpetuating unconstitutional apportionment. (R. 83)

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[5] Blackwater, Pungo, Princess Anne and Virginia Beach.

[6] For example, 20 candidates file for election as follows:
8 contest for the 4 At Large councilmanic seats;
2 run for the Bayside residential seat;
2 run for the Kempsville residential seat;
2 run for the Lynnhaven residential seat;
1 runs for the Blackwater residential seat;
2 run for the Pungo residential seat;
1 runs for the Princess Anne residential seat;
2 run for the Virginia Beach residential seat.
The Blackwater and Princess Anne borough residential candidates would be elected without opposition. The 8 candidates running at large could receive the 8 highest number of votes and yet only 4 would be declared elected and the residential candidates from Bayside, Kempsville, Lynnhaven, Pungo and Virginia Beach receiving the highest number of votes between the two candidates running for the residential seat would be declared elected, although his total vote was less than the 8th highest candidate running at large.

The District Judge[7] approved the "Seven-Four Plan".[8]

After "OFFICIALS" decided to seek an amendment to the Charter to comply with the District Court opinion of December 7, 1965, they never questioned the applicability of the "one man — one vote" principle to the City of Virginia Beach.

On appeal, the Court of Appeals for the Fourth Circuit, in a unanimous opinion (R. 116) reversed the Lower Court and held the plan unconstitutional and remanded the case for further proceedings.

ARGUMENT

I

INTRODUCTION

In view of the able amicus curiae brief of the Solicitor General documented by replete authorities relating to this appeal, which brief has been filed prior to the filing of the instant brief, "VOTERS" will primarily direct their brief to argument peculiar to the Virginia Beach case.

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[7] District Judge Walter E. Hoffman, who dissented from Judge Albert V. Bryan's majority opinion in the state reapportionment case of *Mann v. Davis*, (1962) 213 F. Supp. 577.

[8] The District Judge recognized the tenuous posture of the "Seven-Four Plan" when measured by the "one man—one vote" principle stating (R. 110):

"... While the question is not free from doubt, this Court does not believe that the constitutional limitations of the 'one person, one vote, rule extend that far."

II

A. "OFFICIALS" WAIVED THE RIGHT TO ARGUE THE APPLICABILITY OF THE "ONE MAN—ONE VOTE" DOCTRINE TO THE ELECTION OF THIS CITY COUNCIL

The only time "OFFICIALS" made an issue of the applicability of the doctrine of "One man — One Vote" to local government was during their argument before District Judge Walter Hoffman prior to his ruling that the principle was applicable.[9]

The District Court gave each city involved in its opinion the option of going to the General Assembly and seeking a charter change to correct the malapportionment then existing, or of submitting to a Court order requiring elections on an at large basis. An order was entered on this opinion on December 7, 1965. (R. 82)

No appeal was noted from this order. "OFFICIALS" accepted the terms of the order and went to the General Assembly and obtained the charter change creating the "Seven-Four Plan".[10]

"VOTERS" filed a supplemental complaint contesting the constitutionality of the "Seven-Four Plan" (R. 83) which preserved rural representation by providing a residential councilman from boroughs containing populations that continued to be flagrantly disparate.

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[9] On December 7, 1965, Judge Hoffman handed down his opinion holding the principle was applicable to local government and declared the councils of the cities of Virginia Beach and Chesapeake to be malapportioned. (R. 78).

[10] As a matter of legislative comity, the Charter changes bearing the unanimous endorsement of City officials are routinely granted by the Virginia General Assembly.

At the hearing on the supplemental complaint, "OFFICIALS" did not plead or brief the issue now raised regarding the applicability of "One man — One vote", nor did they do so on appeal before the Court of Appeals for the Fourth Circuit.[11]

The issue of the applicability of "One man — One vote" to this case was settled by the District Court order of December 7, 1965, which was not appealed and the issue not having been presented to the Court of Appeals for the Fourth Circuit it cannot now be raised.[12]

B. THE "ONE MAN — ONE VOTE" PRINCIPLE PROTECTS THE VALUE OF A CITIZENS VOTE IN A COUNCILMANIC ELECTION

"VOTERS" submit that the applicability of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States is to be determined with reference to the individual's right that is the subject of the

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[11] The questions presented to the Court of Appeals for the Fourth Circuit were stated in "VOTERS'" brief in that Court as follows:

"A. Is the Seven-Four Plan constitutional?

B. Are "VOTERS" entitled to a stay of the pending election under the 'Seven-Four Plan'?

C. Are "VOTERS" entitled to attorneys' fees?"

"OFFICIALS" adopted those questons, stating in their brief before the Fourth Circuit:

"The three questions stated in Voters' brief correctly present the ultimate issues of the case."

[12] *Corrigan* v. *Buckley*, 271 U.S. 323, 330, 331, 46 S.Ct. 521, 523, 524, 70 L. Ed. 969, (1926)

"*** it is our duty to decline jurisdiction if the record does not present such a constitutional or statutory question substantial in character and *properly raised below.* ***" (Emphasis added)

See also *Shelley* v. *Kraemer*, 334 U.S. 1, 8, 68 S.Ct. 836, 840.

protection, namely, his vote in an authorized governmental election.

The office or issue that is determined by the vote cannot affect the protection of the vote if we are to have representative government.

Prior briefs have noted the significant road signs leading to the logical decision in the instant case that was staked out by this Court in *Gray* v. *Sanders* (1963) 372 U.S. 368, *Wesberry* v. *Sanders*, (1964) 376 U.S. 1, *Reynolds* v. *Sims*, (1964 377 U.S. 533.[13]

It is not necessary at the present time to take issue with any contention that a governmental body, including a state legislature *could* provide a system of appointing local governing officials if the system was not discriminatory and measured up to constitutional criteria in other respects. The Legislature of Virginia has seen fit to require the citizen to meet the same qualifications in order to cast a ballot for state legislative officials as for councilmen. Common laws control councilmanic elections, congressional elections and state legislative elections.[14] These laws reflect the legislative intent of the deliberations of the Virginia Constitutional Convention of 1901-02 that city governments were dual in nature, discharging on one hand state services and on the other services unique to local government.[15]

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[13] 377 U.S. 555:

"*** And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

[14] Sections 24-176 through 24-290 of the Code of Virginia of 1950, as amended.

[15] Journal of the Constitutional Convention of Virginia, 1901-02, Journal and Documents, Report of the Committee On The Organiz-

Virginia state law surrounds the councilmanic ballot with the same sanctity and protection as the congressional or legislative ballot, the same voting hours, the same election officials, the same control of poll books and the same manner of voting are provided. The laws regulating the qualification of candidates for the state legislature and the city council are the same.[16]

The constitutional requirement that dictated that the vote of every citizen be guaranteed equal weight and influence in the selection of those representatives who would fashion the laws relating to state services requires that the same guarantee be afforded the vote that will select the councilmen who will discharge the responsibilities of the intimate problems of city government.

The Council of the City of Virginia Beach has the primary responsibility for education, police protection, fire protection, sanitation and local highways.

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ation And Government of Cities and Towns, Page 1:

"In carrying out these general ideas, it was necessary to bear constantly in mind the dual character of cities. In one sense, a city is a governmental agency of the State to carry out, within its territorial limits, the general policies of the State government.

"In another sense, a city is itself a government, local in the exercise of its functions; charged by the State with the government of the people resident within its limits, in accordance with their legitimate desires in all matters affecting them distinctively, and not related to the general welfare of the State at large."

[16] Section 24-133 of the Code of Virginia of 1950, as amended.

"*** nor shall the name of any candidate for the General Assembly, or for any city or county office, other than a party nominee as above mentioned, be printed on the ballots provided for the election, unless he file along with his notice of candidacy a petition therefor, signed by fifty qualified voters of his city, county, or district, as the case may be, witnessed as aforesaid and with like affidavits attached thereto."

This Court's opinion in *Fortson* v. *Morris* (1967) 385 U.S. 231, involved a legislative act that permitted delegates of the Georgia state legislature to select the state's governor under certain circumstances. The majority opinion was not relevant to the instant case where state law requires that city councilmen be determined in duly constituted elections. However, the language of Mr. Justice Fortas in his dissenting opinion is relevant and decisive.[17]

We submit — The Vote's The Thing!

A citizen's vote is entitled to equal protection without reference to the election in which it is cast.

C. THE COURT OF APPEALS FOR THE FOURTH CIRCUIT WAS CORRECT IN HOLDING THE "SEVEN-FOUR PLAN" WAS AN UNCONSTITUTIONAL EVASION OF THE MANDATE OF REYNOLDS V. SIMS, (1964) 377 U.S. 533

Fear of orderly annexation as a result of the urban sprawl emanating from the City of Norfolk into Princess Anne County precipitated a "shot-gun" merger of the resort City of Virginia Beach, with a five man city council elected at large, and Princess Anne County, with six magisterial districts each having one supervisor assigned on a geographical basis without reference to population. An apparent prerequisite of the merger was to insure the seats of the two governmental bodies involved.

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[17] 385 U.S. 249:

"*** A vote is not an object of art. It is the sacred and most important instrument of democracy and of freedom. In simple terms, the vote is meaningless — it no longer serves the purpose of the democratic society — unless it, taken in the aggregate with the votes of other citizens, results in effecting the will of those citizens provided that they are more numerous than those of differing views. That

"VOTERS'" initial complaint brought a voluntary admission[18] indicating unconstitutionality prior to the Lower Court opinion of December 7, 1965, so holding. (R. 78).

The fatal defect noted by all was the disparity of population between the various boroughs of the new city.

The purpose of the original plan was to insure the election of representatives from sparsely settled rural boroughs. This particular objective was doggedly retained by "OFFICIALS".[19]

As noted, the "Seven-Four Plan" made no changes in the geographical demarcations of the seven boroughs and, therefore, no change was made in the disparate distribution of population among the seven boroughs. The only change was to create four councilmanic seats to be filled by at large candidates and to give the voter in the heavily populated borough the right to vote for a rural oriented residential councilman. This somewhat sophisticated scheme did not in any way breathe constitutionality into the Plan.

This Court has condemned illegal vote weighting, re-

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is the meaning and effect of the great constitutional decisions of this Court."

[18] Infra, Footnote 4.

[19] "OFFICIALS'" key witness testified (R. 93, 94):

"Q. Is it fair to state, based on your testimony, that the motivating factor in the Council of the City of Virginia Beach deciding on the residential requirement for 7 of the 11 councilmen was to guarantee the election of at least a certain number of agriculturally-educated and oriented councilmen?

"A. Well, I would say that the plan that was presented would insure those communities, or at least would indicate to the public, and would result in an election where the men with this background would serve on the Council, and with this knowledge."

gardless of whether the distortion is the result of a simple or a sophisticated scheme.[20]

Circuit Judge Bryan in the opinion written for a unanimous Court, held that the "Seven-Four Plan" perpetuated the unconstitutionality of the apportionment of representation in Virginia Beach's government: (R. 121, 122)

> "Altogether unrealistic is the assumption that the member from the smaller populated political subdivision would give, or could humanly be expected to give, the far greater populated subdivisions representation equal to that he accords his residence constituency. Nor would his naturally dominating provincial interest be neutralized by his dependence upon the electorate of the entire city for his office. His subsequent defeat, because of a show of parochialism, would not remove the inequality in representation, for the choice of a successor would still be limited to the same district. The smaller area of population would thus continue to have representation equivalent to the much larger districts. This curtailment upon the selectivity of potential candidates is further proof of the vulnerability of the plan. Manifestly, the discussion in Fortson v. Dorsey, supra, 379 US 433, 438 seemingly discounting the fear of sectionalism in a district's legislator was conditioned upon 'substantial equality of population' among the legislative districts there.
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> "Moreover, confessedly, the Virginia Beach plan was purposed, and drafted with an eye, to include in the makeup of the council the representation of the peculiar interests of each borough. It was architectured to give voice to the agricultural or non-urban con-

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[20] *Reynolds* v. *Sims*, 377 U.S. 533, 562:

> "*** Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable. One must be ever aware that the Constitution forbids 'sophisticated as well as simple-minded modes of discrimination.' ".

cerns of the smaller boroughs. However understandable, reasons of this kind may not be counted in appraising the Constitutionality of an apportionment. Reynolds v. Sims, 377 US 533, 562 (1964); Ellis v. Mayor and City Council of Baltimore, supra, 352 F2d 123, 128."

A balancing of urban and rural power was rejected by this Court as a rational factor in apportionment plans in *Davis* v. *Mann*, 377 U.S. 678, 692.[21]

Residence requirements were frowned upon when Chief Judge Haynsworth, sitting on a three judge statutory court, decided *O'Shields* v. *McNair*, (1966) 254 F. Supp. 708.[22]

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[21] 377 U.S. 692:

"We also reject appellants' claim that the Virginia apportionment is sustainable as involving an attempt to balance urban and rural power in the legislature. * * *"

[22] 254 F. Supp. 713:

"The basic reapportionment question is gravely complicated by the presence in each plan of a 'negative residence' clause, which, superficially at least, appears to lend credence to the suggestion that the purpose to achieve a reasonable apportionment was too greatly compromised by a purpose to preserve the offices of some of the Senators now representing some of the smallest counties.

"*** By virtue of the districting, this provision operates to guarantee to some small counties a resident Senator while other counties of more than twice the population have no such protected right."

254 F. Supp. 714:

"But a construction most favorable to the validity of the provision does not obviate all of the difficulties. We may take judicial notice of the fact that the incumbent Senator from Calhoun should have little difficulty in winning one of the senatorial seats allotted the Orangeburg-Calhoun District. The effect of the negative residence clause is to exempt him from the need of campaigning, until one of his Calhoun County neighbors rises up to file against him. The provision, if effective, at all, is a continuing one, so, no matter how disaffected Orangeburg voters may become with him or any of his

If the Fourth Circuit had failed to reject the sophisticated discrimination effected by the "Seven-Four Plan", it would have pointed the way to a thicket of evasive maneuvers in future legislative, as well as local government apportionments.[22]

The simplicity of the guidelines laid down by this Court in *Reynolds* v. *Sims*, 377 U.S. 533, produced rapid acceptance of representative reapportionments by at least 46 of the 50 state legislatures.

D. VIRGINIA'S LEGISLATIVE HISTORY SUPPORTS THE APPLICATION OF THE "ONE MAN — ONE VOTE" PRINCIPLE TO COUNCILMANIC APPORTIONMENT

The last Constitutional Convention held in Virginia was the Convention of 1901-1902, the first Constitutional Convention following the Civil War. This convention resulted in the promulgation of Section 121 of the Constitution (Appendix A, I), which required that where a city elected councilmen from wards (analogous to boroughs) the plan of apportionment had to provide, as far as practicable equal representation in proportion to the population

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successors in future years and no matter how many likely aspirants there may be in a relatively populous Orangeburg, the Senator from Calhoun will have no opposition so long as no likely Calhoun man comes out to oppose him. *In view of the great disparity in the populations of the two counties, this constitutes some restriction upon the choices available to the voters of the district.*" (Emphasis Added.)

[22] If the "Seven-Four Plan" should be held constitutional by this Court, the Virginia Constitution could be amended to enlarge the House of Delegates to 140 members, with one Delegate being assigned to every city and county in Virginia, regardless of size, and the gross malapportionment would be justified by allowing the voters of each political subdivision to vote for the resident Delegate of the other subdivisions. Such a scheme would return us to the urban-rural imbalance of malapportioned representation that has so recently been corrected.

of each ward. To implement this constitutional guarantee, the General Assembly enacted Sections 15.1-803 and 15.1-806 of the Code of Virginia. (Appendix A, II).

The delegates to the 1901-02 Conventions were prophetic in their prediction regarding the complexity of municipal government. There were those at the Convention who attempted to resist writing into law a mandate that where wards were employed in a councilmanic structure those wards must contain as nearly as practicable the same number of people, by reason of their fear that wards containing a majority of negro citizens might be able to elect a negro councilman.[24]

The predominant desire of the application of the "One Man — One Vote" principle was presented by Delegate Pollard of the City of Richmond, who stated that the vitality of city government required that representation on Council be in direction relation to the number of inhabitants within the respective wards.[25]

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[24] Report of the Proceedings and Debates of the Constitutional Convention, State of Virginia, Vol. II, 1901-1902, p. 1950, Delegate Thom:

"*** In almost every city in the Commonwealth there are a very large number of negroes who congregate in one special section of the city. If a suffrage plan is adopted which will disfranchise these negroes, there will still be under the article, as suggested by the committee, a requirement that the representation in the council shall be based upon the whole population in that ward, and will give to the white people in one ward from five to ten times the influence in the city council that the white man in another portion of the city will have. ***"

[25] Report of the Proceedings and Debates of the Constitutional Convention, State of Virginia, Vol. II, 1901-1902, p. 1950, Delegate Pollard:

"Mr. Chairman, I hope it will be the pleasure of this committee

to sustain the report of the Committee on Cities and Towns. The gentleman from Norfolk is mistaken in supposing that any such danger as he has suggested is imminent. I would like to call the attention of the members of this committee to a condition of affairs which exists in the city of Richmond. Our condition but illustrates the importance of having such a rule as is laid down in the report of the committee. We have in this city six wards with population distributed very unequally among them. We have one ward that is nearly three times as large in population as any other ward, and yet this large ward, with immense property values, paying to the city treasury and to the State treasury often three, four or five times as much in personal taxes of this city and State, has only the same representation as is given to a ward having about one-third the population. The result has been that citizens living in certain parts of the city have three times the voice in the management of the city affairs as those in other portions of the city; and the further result has been that through the representation in the city council the minority of the people of the city of Richmond now rule the city, and that is one reason, gentlemen of the committee, that there has been so much complaint against our city government. It is because the lower portions of this city, having a small population, have the same representation in the council, and hold the better element of this city by the throats, and will not let them do what is best for the interests of this city. Take the outlying Clay ward which has been the ward in which there has been most growth. It has nearly three times the population of Jefferson ward, the ward just below us. Jefferson ward is a finished ward. Nearly all the streets in that ward are paved, nearly all the houses in that ward are supplied with gas and water connection, while out in Clay ward, with an area very much larger, they have refused to put in those conveniences, although Clay ward pays about three or four times as much taxes. What has been the result? The people desiring to build new houses, instead of building in the growing wards, where they would naturally have built if they could have gotten gas, water and culvert connections, have erected their homes on the suburbs, where they would not have to pay city taxes, which they would have been willing to pay if they could have gotten city conveniences. They have gone out and built little towns all around Richmond, and our city, instead of showing a growth of 25 per cent, as it has in almost every decade in its history, in the last ten years only increased about 3 per cent. The small wards, having control of the council, often succeed in having the money for improvements apportioned among the wards, irrespective of the size, the condition, and the needs of the wards. They pull up and put down new pavements, here in the center of the city, where we do not need them, and neglect portions of the city which are destitute of all city conveniences. I call your attention to our condition, not because I want you to put this clause into the Constitution just for the benefit of our city, but because it shows

what injustice may be done under the present state of the law. What has happened in Richmond is likely to happen anywhere. This is no new principal we are seeking to imbed in the law. Representation in the House of Delegates and in the Senate is of proportion according to population, and based on the censur of the United States. We recognized the same principle when we reapportioned the representation in Congress according to population. It is a fundamental principle that should be embodied in the organic law — a guarantee to the citizens of the cities equal voice in the management of municipal affairs. We have applied to the Common Council for relief from this iniquitous condition, and they laugh in our faces, just because the representatives of the smaller wards are not willing to give up the unfair advantage which the condition gives them. They offer the flimsy excuse that if they give us representation according to our population, they would have to give larger representation to Jackson ward, the negro ward of the city. Why, there has not been a negro for years in the Common Council. The Democrats are elected by a large majority in Jackson ward to-day. We have Democrats representing the negroes in the council. It is a great injustice to leave it as it is, and I hope the committee will stand by the unanimous report of the Committee on Cities and Towns.

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"If it is not a fundamental principle that every citizen in the Commonwealth should have equal voice in the management of the affairs of his city, leave it out of the Constitution? If it is not a fundamental principle that the majority should rule in the cities, leave it out of the Constitution. The affairs of the city of Richmond come much closer to us than do the affairs of the State. The taxation we pay to the State is only forty cents on $100, while it is $1.40 on $100 for the city. We get from the city police protection; we get fire protection, and we get our water and our light from the city. The affairs of the city come much nearer to our homes and our firesides than the affairs of the State. Why should men, in a free country, be allowed to discriminate against the citizens of the cities in this manner? Is this a free country? Are we to allow political cliques to hold by the throats a majorty of the people of the cities? Is that fair? Is it just? Is that not a proper matter to guard against in the Constitution itself? Ought not the Constitution to guarantee to every citizen equal voice in the management of municipal affairs?

Gentlemen, I appeal to you not to allow the violation of this great principle. Though you allow it for the purpose of discriminating against the negro, the day will come, as it has come in this city, in the city of Danville, and in the city of Lynchburg, where they use it against the white man instead of against the negro. We ought not to violate a principle for a supposed difficulty in these cities that have appealed to you to leave their hands free."

At least in Virginia the principle of "One Man —One Vote" as an essential prerequisite to maintaining representative government on a local level was recognized over one-half century ago.

E. WHEN "VOTERS" SUIT WAS ORIGINALLY FILED NO CIRCUIT COURT OF APPEALS HAD RULED REGARDING THE APPLICABILITY OF "ONE MAN — ONE VOTE" TO THE APPORTIONMENT OF REPRESENTATION ON CITY COUNCILS

After the filing of the instant suit the Court of Appeals for the Fourth Circuit settled the question in this circuit. *Ellis* v. *Mayor and City Council of Baltimore* (1965) 352 F. 2d 123.

In view of this development, "VOTERS" agree with that portion of Judge Bryan's opinion holding that a three judge court (R. 76) is inappropriate where the decision will be governed by the application of constitutional provisions already authoratatively established.[26]

As a practical matter the purpose of Title 28 U.S.C.

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[26] "Furthermore, we think that a three-judge court is also inappropriate because this litigation no longer presents a Constitutional question which is beyond the jurisdiction of a sole District Judge. The statute does not require three judges where the decision will be governed by the application of Constitutional principles already authoritatively established. James & Co. v. Morgenthau, 307 US 171, 172; Harvey v. Early, 160 F.2d 836, 838 (4 Cir. 1947). That the "one person, one vote" precept embraces councilmanic representation is now settled in this Circuit. Ellis v. Mayor and City Council of Baltimore (4 Cir. October 11, 1965); see also Bianchi v. Griffing, supra, 238 F. Supp. 997 (EDNY 1965) and authorities cited therein. Moreover, the fact of a plain and flagrant disproportion of councilmen in certain boroughs in each city is not denied by the defendants. What may now and subsequently have to be decided in these cases are matters well within the province and for the judgment of a one-judge court."

Section 2281 was complied with when the three judge court, in dissolving itself, decided the crucial issue, the applicability of "One Man — One Vote" to city council apportionment.

In view of the settled status of the question in the Fourth Circuit, its opinion was not required to and did not pass on the constitutionality of Section 117 of the Constitution of Virginia, (Appendix A, III) which attempted to grant power to the state legislature to deviate from the "One Man — One Vote" mandate of Section 121 of the Constitution of Virginia (Appendix A, I) and Sections 15.1-803 and 15.1-806 of the Code of Virginia of 1950, as amended. (Appendix A, II).

Absent this issue, the only question involved was the constitutionality of an amended charter provision that was essentially local in character. *Ex Parte Collins*, 277 U.S. 565; *Rorick* v. *Board of Commissioners of Everglades District*, 307 U.S. 208; *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218.

CONCLUSION

The "Seven-Four Plan" is a sophisticated unconstitutional plan of councilmanic apportionment that attempts to conceal the invidious discrimination perpetuated against heavily populated boroughs by allowing those voters to participate in their malrepresentation by voting for rural oriented councilmen from substantially under populated boroughs insured of election by reason of a residential requirement.

The judgement of the Court of Appeals for the Fourth Circuit should be affirmed and the case remanded to the

United States District Court in accordance with the mandate of the appellate court.

Respectfully submitted,

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